

GRACE TSOSIE
v.
NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-54-A

Decided July 9, 1991

Appeal from a finding of homesite trespass on a Navajo allotment.

Affirmed as modified.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Aboriginal Title--Indians: Lands: Trust Patent

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a trust patent issued by the Bureau of Land Management or to determine aboriginal title to land.

2. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Generally

When a Bureau of Indian Affairs Area Director fails to issue a decision in a matter appealed to him, the Superintendent's decision cannot properly be said to be "final" for the Department of the Interior.

3. Indians: Leases and Permits: Cancellation or Revocation

Where a lessee of Indian trust land has been given ample opportunity to cure a breach of the lease and has failed to do so, 25 CFR 162.14 does not require that he be given yet another opportunity.

4. Indians: Leases and Permits: Violation/Breach: Generally

The fact that a lessee abides by the terms of a lease of Indian trust or restricted land for a period of time does not excuse a later breach of those lease terms, or give the lessee some form of "right" to remain in possession of the leasehold.

5. Indians: Lands: Allotments: Generally--Indians: Trust Responsibility

In considering matters raised by one Indian against a second Indian relating to the second Indian's trust allotment, the Bureau of Indian Affairs' trust duty is to the person for whom the land is held in trust.

APPEARANCES: Paul E. Frye, Esq., Albuquerque, New Mexico, for appellant; Theresa A. Gomez, Esq., Field Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for the Area Director; Robert N. Hilgendorf, Esq., Santa Fe, New Mexico, for Reuben Mariano.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Grace Tsosie seeks review of a January 29, 1990, decision of the Navajo Area Director, Bureau of Indian Affairs (BIA; Area Director), concerning an alleged homesite trespass on Navajo Allotment 868. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified in this opinion.

Background

Allotment 868, which was allotted to Na tithl hi ya, is located in the NE¼, sec. 23, T. 17 N., R. 13 W., New Mexico Principal Meridian, McKinley County, New Mexico, and contains 160 acres more or less. The allotment was made under the authority of the General Allotment Act of 1887, 25 U.S.C. § 331 (1988) and was one of several that were originally approved in 1909-10. BIA records show that Na tithl hi ya is also known as Reuben Mariano. 1/ Mariano was approximately 4 years old when the allotment was approved.

It appears that sometime in the period 1915-16, the land comprising Allotment 868 was patented to the predecessor of the Santa Fe Railway. The land was reconveyed to the United States in 1933.

Leo and Bah Mary Arviso, appellant's parents, apparently moved onto Allotment 868 sometime in the late 1920's or early 1930's. The Arvisos' use and occupancy of the allotment was with Mariano's knowledge and consent.

On October 21, 1964, the Bureau of Land Management (BLM), issued Trust Patent No. 1237069 to Na tithl hi ya. 2/ The Arvisos were still living on

1/ Appellant argues that Mariano is not Na tithl hi ya. Appellant's arguments in support of this allegation are unsupported suppositions. Such arguments are not sufficient to sustain a finding that Na tithl hi ya and Mariano are not the same individual. It is interesting that appellant's mother, who knew and dealt directly with Mariano over a period exceeding sixty years, never challenged his identity.

2/ Allotment 868 has an extensive and complex history of status, use, and occupancy during the years from 1909 through 1964. This history is not relevant to the present decision.

the allotment at that time. The record does not explain the hiatus between the reconveyance of this property to the United States in 1933 and the issuance of the 1964 patent.

On January 21, 1968, Mariano leased a 1-acre tract within Allotment 868 to the Arvisos "[t]o construct a residence and associated buildings or structures." Annual rental of \$20 was payable February 1 of each year for the 25-year term of the lease. The lease took effect on February 1, 1968, and was to run through January 31, 1993, and provided for a 25-year renewal at the expiration of the original term. It was approved by the Acting Superintendent, Eastern Navajo Agency, BIA Superintendent, on January 29, 1968. 3/

A note to the file indicates that on August 13, 1970, Mariano asked BIA if the Arvisos were current with their lease payments, because he was interested in terminating the lease so that his children could use the allotment. The note in the administrative record states that the cash collections record showed no payments since April 1969. Mariano apparently stated that the failure to pay the rent indicated to him that the Arvisos no longer wanted the lease. Mariano stated that Leo Arviso had suggested exchanging Allotment 868 for one Arviso had in the Mariano Lake area, where Mariano lived. 4/ The record does not show that any further action was taken at this time.

On or about August 20, 1973, subsequent to the death of Leo Arviso, Mariano presented a sworn statement to the Superintendent, indicating that he did not want to exchange his allotment, but instead wanted to use it for himself and his family. The Superintendent requested an opinion from the Solicitor concerning whether Bah Mary Arviso had any claim to Allotment 868, and what, if any, relief could be given to her. By letter dated October 16, 1973, the Albuquerque Field Solicitor responded, stating at page 2 of the letter:

Based upon our review of your official land file in this matter, it is our opinion that the Arvisos have no legal claim to any portion of the subject allotment, other than whatever rights they may still have under the Homesite Lease entered

3/ A second lease, No. CP-15-19-68, also entered into on Jan. 29, 1968, leased the entire acreage of Allotment 868 to the Arvisos for grazing purposes and provided that not more than 4 acres could be cultivated. The lease had a 5-year term, running from Feb. 1, 1968, through Jan. 31, 1973, and an annual rental of \$50. This lease has expired by its own terms. It was not renewed and is not at issue in this appeal.

4/ BIA records in the file show that Leo Arviso did not have an allotment. Bah Mary Arviso, however, had been allotted Allotment 1222, which is located approximately 4 miles south of the Mariano Lake Trading Post in McKinley County, New Mexico. Records further show that on June 6, 1960, Bah Mary Arviso mortgaged this allotment, with BIA approval, to the Navajo Nation. The mortgage was paid off in 1970. The allotment was deeded to Pat Chee Miller and Loretta M. Miller on Aug. 14, 1973.

into on January 21, 1968. Since rental payments have been delinquent for many years, this lease is subject to cancellation, and probably should be cancelled, inasmuch as [Mariano] has expressed a desire to utilize said lands for himself. It is noted that the Homesite Lease covers only a 1-acre tract on the allotment. Consequently, if the Homesite Lease is not cancelled prior to the end of its 25-year term, [Mariano] still has the right to construct a home and any improvements, at any location on the allotment, other than the one (1) acre leased tract.

The fact that the Arvisos have used the land for the past thirty (30) years or so does not give them any legal claim to the lands. As you know, it has long been held that a claim of adverse possession cannot run against restricted Indian lands. United States v. 7,405.3 Acres of Land, 97 F.2d 417 (1938); United States v. Raiche, 31 F.2d 624 (1928); United States v. Schwarz, 460 F.2d 1365 (1972).

In view of the foregoing, any relief to be afforded to the Arvisos, with respect to the subject lands and the improvements thereon, must be accomplished with the unqualified consent and approval of [Mariano].

BIA subsequently held a meeting with Mariano and Arviso. According to the report of that meeting in the administrative record, Arviso requested a lease of 10 acres of the allotment, saying that Mariano could use any other part of the allotment and that there was enough room for all of his children to have homesites on the allotment. Mariano repeated that he was not interested in continuing to lease the property. After a subsequent meeting between Mariano and BIA, at which Mariano repeated his intent not to lease, BIA began the process of informing the Arviso family that they would have to vacate the property.

Apparently Mariano and the owner of an adjoining allotment began fencing their allotments. ^{5/} The Arviso family sought an injunction against them from the Navajo Tribal Court. Mariano was ultimately dismissed from the suit on the basis of an assurance that BIA would resolve the question of Arviso's claim of right to the allotment.

When BIA did not act quickly enough, Mariano filed suit in Navajo Tribal Court, seeking, inter alia, a writ of mandamus requiring BIA to cancel the homesite lease and eject Arviso from the allotment. By letter dated December 4, 1981, the Superintendent wrote Arviso, confirming prior verbal information given to appellant that the 1968 homesite lease was null and void:

[Appellant] was informed that the Agency Superintendent did not have the authority to approve homesite leases in 1968. The

^{5/} It does not appear that the adjoining landowner's activities are relevant to this appeal.

Superintendent was not delegated that authority until March 17, 1980. There was also a condition in the lease which required a \$20.00 annual payment for the lease, of which you are delinquent in payments.

BIA successfully removed Mariano's lawsuit to Federal district court, and on the basis of the December 4, 1981, letter, Mariano agreed to the dismissal of the BIA officials from the suit, and the reminder of the case was remanded to Navajo Tribal Court. 6/

Appellant appealed the Superintendent's letter to the Area Director. The administrative record contains several letters relating to requests for and the denial of extensions of time to file a statement of reasons in support of the appeal, and a motion from Mariano to dismiss the appeal. However, it does not contain any decision by the Area Director. Neither is such a decision cited by any party to this proceeding.

Arviso died intestate on November 13, 1987. Arviso's trust estate was probated by Administrative Law Judge Patricia McDonald, who entered an order on August 16, 1989, determining Arviso's heirs to be her three surviving children, including appellant, and the children of a previously deceased daughter. A final order concerning the probate of Arviso's non-trust property was entered by the District Court of the Navajo Nation, Judicial District of Crownpoint, New Mexico, on February 21, 1989. The court noted that most of Arviso's non-trust property was distributed to her family in a Navajo traditional manner. The court reviewed the family's stated desires as to the use of the lease at issue here and approved the request that the leasehold interest be awarded to appellant.

By letter dated September 19, 1988, the Superintendent wrote appellant, stating:

Mr. Mariano was allotted [Allotment 868] on October 20, 1909, and issued Trust Patent No. 1237069 on October 21, 1964. As sole owner of this property, Mr. Mariano has the right to request that you move off his property. Mr. Mariano has indicated that he does not wish to permit or lease any portion of his property to you for residential purposes.

This letter is to inform you that you are to move off Mr. Mariano's property within (90) ninety days from receipt of this notice * * *. You will be allowed to remove any and all structures and improvements that you have placed or constructed

6/ The status of this case in Navajo Tribal Court is not clear from the record. It appears that a settlement agreement was reached between Mariano and Arviso, but because the agreement was not satisfactory to Mariano's family, he declined to execute it. The record suggests that Mariano may have sought dismissal of the case without prejudice as to refileing.

on the property. Any structures and improvements that [are] left on the property after the (90) ninety days will be considered the property of Mr. Mariano.

Appellant appealed this decision to the Area Director. Following several extensions of time and a lengthy briefing period, on January 29, 1990, the Area Director affirmed the Superintendent's decision, stating at pages 1-2:

Mr. Mariano is the owner of Allotment 868 * * *. [Appellant] is living on Allotment 868 without the proper authority to do so.

Although Mr. Mariano entered into a lease for the use of one acre of Allotment 868 with Leo and Bah Mary Arviso, [appellant's] parents, in 1968, that lease was cancelled and declared null and void by the Superintendent Eastern Navajo Agency in 1981. [Appellant] did not timely file appeal documents of the administrative decision to declare the lease null and void.

[Appellant] challenges the validity of Mr. Mariano's allotment, however, even if the title to the patent to Mr. Mariano were questionable, [appellant] has provided no evidence of ownership rights to the allotment in question. She may continue to question whether Na tithl hi ya as shown on the Record of Allotment is Reuben Mariano, however, [appellant] has not presented sufficient evidence of rights to the allotment in 1909 when the patent was approved, and only now asserts individual aboriginal title.

While the Navajo Tribal Court issued a Final Order on February 21, 1989 in the probate proceedings of the Estate of Bah Mary Arviso * * *, the Court did not adjudicate the validity of the homesite lease for one acre tract in Allotment No. 868 within the Eastern Navajo Agency. The Court merely distributed those assets presented by [appellant] as her mother's estate. [Emphasis in original.]

The Board received appellant's notice of appeal from this decision on February 16, 1990. Although for the most part, appellant and Mariano relied on the documents they had previously submitted in this matter, each made additional statements on appeal. The Area Director also filed a brief.

Discussion and Conclusions

Appellant contends: (1) the approval of allotment application 868 in 1909 was a nullity; (2) assuming that Allotment 868 was validly patented to Mariano, her possessory rights are protected by her homesite lease; and (3) the attempt to oust her and her family from Allotment 868 is barred by laches, waiver, and estoppel.

Appellant argues that allotment application 868 could not have been validly approved in 1909 because the lands had previously been granted to

the predecessor of the Santa Fe Railway and “[t]he railroad grant obviously predated 1904, the approximate year of the birth of Reuben Mariano” (Appellant’s Oct. 4, 1989, Statement of Reasons, at page 2). Appellant thus contends that the allotment selection conferred no rights on Mariano, because the railway had vested rights to the land at that time. Although appellant presents no support for her assertion that the railroad grant predated the approval of allotment application 868, ^{7/} she cites Davis v. Wiebbold 139 U.S. 507, 529-30 (1891), in support of her argument. Appellant also contends that the allotment application could not have been validly approved because her ancestors had aboriginal rights to the tract.

[1] These arguments are in essence, a challenge to the validity of the trust patent issued by BLM. The Board is not a court of general jurisdiction and has only that authority which has been delegated to it. It has not been delegated authority to review actions taken by BLM or determine the validity of a trust patent issued by that bureau. See Burchard v. Acting Sacramento Area Director, 19 IBIA 254 (1991). Nor has the Board been delegated authority to determine aboriginal title. Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63, 66-67 (1990). Accordingly, this Board lacks jurisdiction over the claim made in appellant’s first argument.

Appellant’s second argument is that her possessory rights to Allotment 868 are protected by the 1968 homesite lease. Appellant contends that she tendered lease payments, but BIA refused to accept them because of Mariano’s instructions. She argues that BIA has no authority to ignore a duly executed and approved lease, even if Mariano changed his mind.

[2] The Area Director’s decision was based on his belief that the homesite lease had been cancelled in 1981. The Superintendent found in 1981 that the lease was null and void because in 1968 authority to approve such leases had not been redelegated to the Superintendent, and that the terms of the lease had been violated by the failure to pay rent. The administrative record shows that the Superintendent’s 1981 decision was appealed to the Area Director, who denied two requested extensions of time for filing a statement of reasons. 25 CFR 2.18 (1981) provided:

The Area Director shall render a written decision in each case appealed to him, and he shall include a statement that the

^{7/} The administrative record, although admittedly confusing because of imprecise statements by various officials, suggests that the railroad obtained title pursuant to the Act of July 27, 1866, 14 Stat. 292, around 1915-16. See, e.g., May 13, 1981, memorandum from the Superintendent to the Field Solicitor; Oct. 6, 1964, memorandum from the New Mexico State Director, BLM, to the Director, BLM. The record further indicates that, pursuant to the Act of Mar. 3, 1921, 41 Stat. 1239, the railroad relinquished the tract to the United States under Exchange Serial No. SF 065068, which was approved on Aug. 5, 1933.

decision will become final 60 days from receipt thereof unless a notice of appeal is filed with the Commissioner of Indian Affairs pursuant to §§ 2.10, 2.11, and 2.13 of this part. A copy of such decision shall be forwarded to each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

Although under 25 CFR 2.17 (1981), the Area Director could have summarily dismissed the appeal for failure to file a statement of reasons, there is no evidence that he issued any decision. Even the Area Director's answer brief in the present appeal does not cite an earlier Area Director's decision. Because of this apparent failure to respond to the appeal, the Superintendent's 1981 decision cannot properly be characterized as "final." 8/

Because the appeal process begun in 1981 was apparently never completed, the Board could remand this matter to BIA for a new decision on lease cancellation. Based upon a thorough review of the administrative record and the posture of this case, however, the Board has determined that such a procedure would only result in further unnecessary delays. Therefore, the Board will review the Superintendent's 1981 decision as well as the Superintendent's and Area Director's 1988 decisions.

Assuming arguendo that the lease was valid and/or enforceable, the record indicates that the terms of the lease were violated in at least two respects: (1) annual rent was not paid, and (2) the use covered more than the 1 acre leased. The record further shows that these conditions have existed since at least 1969, and that the Arvisos have long been aware of BIA's position that the lease was subject to cancellation for failure to pay rent.

25 CFR 162.14 sets forth procedures to be followed in cancelling a lease of trust or restricted property. These procedures include notice to the lessee of the nature of the alleged violation and an opportunity to cure the violation. The section further provides:

If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and the possession of the premises.

[3] The Board reviewed the regulatory provision providing an opportunity to cure a breach of a lease in Mast v. Aberdeen Area Director, 19 IBIA 96, 99 (1990):

8/ Present 25 CFR 2.8 provides procedures for appealing the inaction of a BIA official. This regulation was added in 1989. See 54 FR 6480 (Feb. 10, 1989).

This section “contemplates that leases of Indian lands will not be canceled because of breaches that may readily be cured.” Jack Dean Franks v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231, 234 (1985). At the same time, it contemplates that, where BIA reasonably concludes that a breach cannot be cured, a lessee need not be given any further time to cure it. Id. In considering whether a breach may be cured, it is entirely appropriate for BIA to take into account the lessee's past performance under the lease, particularly where the breach at issue is one of long duration or frequent recurrence. See Downtown Properties, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62, 67 (1984); Jack Dean Franks, supra. See also Earle C. Strebe v. Deputy Assistant Secretary-- Indian Affairs (Operations), 16 IBIA 62 (1988).

In the present case, the two breaches of the lease were of long duration, having existed since 1969. Appellant and her predecessors-in-interest were aware since at least 1981 of BIA's position that the lease was void and that, in any case, the lease should be cancelled because of the breach. They were also fully aware of BIA's attempt to cancel the lease in 1981. Appellant alleges only that she attempted to make lease payments, but the payments were not accepted. Although appellant does not state when she made these attempts, it is clear from the record that she had no interest in the lease until 1989, long after the beginning of the breach. Under these circumstances, BIA was not required to give appellant another opportunity to cure the breaches before cancelling the lease. The Board finds that the homesite lease was properly canceled and that appellant has no leasehold interest in Allotment 868.

Appellant's final argument is that the attempt to oust her and her family from Allotment 868 is barred by laches, waiver, and estoppel. This argument relates to the fact that Mariano did not object to appellant's family's residence on the land until approximately 1970.

Appellant's argument assumes that initial permissive use and occupancy of property creates a right to perpetual, or at least continued, use. The administrative record indicates that the use and occupancy of Allotment 868 by appellant's family was originally agreed upon by all concerned. Assuming arguendo that before his receipt of a trust patent, Mariano had a sufficient interest in the allotment by virtue of his approved allotment application to maintain a suit against appellant's family for, e.g., ejectment or trespass, there was no reason to bring such a suit at that time because Mariano had apparently given permission for appellant's family to use and occupy the allotment. The record indicates that as soon as he received a trust patent, Mariano asserted his ownership rights over the allotment. He ultimately determined that he wished BIA to cancel the lease because of the breaches so that he could use the allotment himself. Furthermore, if appellant is attempting to raise an adverse possession argument, it has been definitively settled that a claim of adverse possession cannot run against trust or restricted Indian lands. See, e.g., Catawba Indian Tribe of South Carolina v. State of South Carolina, 865 F.2d 1444 (4th Cir.), cert. denied, 491 U.S. 906 (1989); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp.

780 (D. Conn. 1976). Under these circumstances, the Board declines to find that Mariano is barred from asserting his ownership rights over the allotment.

Appellant also contends that Mariano either gave or sold the allotment to her parents by repeated representations that he had no use for the property and that her family could use or have the land. It appears from appellant's statements that most of these alleged representations were made at a time when the allotment had not yet been patented to Mariano. Assuming arguendo that a gift or sale of property an individual does not own can be enforced against that individual if the property ever comes into his possession, and that an oral promise to convey real property is enforceable, the land at issue here is a trust allotment. Accordingly, Mariano could not convey the property without the approval of the Secretary of the Interior or his delegate. Appellant presents no evidence that Mariano's alleged conveyance of the allotment was approved by BIA.

[4] Appellant also contends that Mariano and the Department are estopped from challenging her occupancy because Mariano received some lease payments under the homesite lease. The fact that a lessee abides by the terms of a lease for a period of time does not excuse a later breach of those lease terms, or give the lessee some form of "right" to remain in possession of the leasehold. 9/

[5] Finally, appellant contends at several points in her filings that BIA has violated its trust responsibility to her. In the context of the present case, while BIA would serve as trustee for any trust property appellant might own, the property at issue is held in trust for Mariano. BIA's trust duty in this case is to Mariano. Smith v. Acting Billings Area Director, 18 IBIA 36, 39 (1989).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 29, 1990, decision of the Navajo Area Director is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

9/ Appellant may also be arguing that the Navajo probate court's decision gave her some form of interest in the lease. It is clear from the court's decision that it merely distributed interests appellant alleged were in her mother's estate. The court did not investigate the validity of the claimed interest.